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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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JOINT NOTICE AND APPLICATION OF
QWEST CORPORATION, QWEST
COMMUNICATIONS COMPANY, LLC, QWEST
LD CORP., EMBARQ COMMUNICATIONS,
INC., D/B/A CENTURY LINK
COMMUNICATIONS, EMBARQ PAYPHONE
SERVICES, INC. D/B/A CENTURYLINK, AND
CENTURYTEL SOLUTIONS, LLC FOR
APPROVAL OF THE PROPOSED MERGER OF
THEIR PARENT CORPORATIONS QWEST
COMMUNICATIONS INTERNATIONAL INC.
AND CENTURYTEL, INC.

DOCKET NO. T-01051B-10-0194
DOCKET NO. T-02811B-10-0194
DOCKET NO. T-04190A-10-0194
DOCKET NO. T-20443A-10-0194
DOCKET NO. T-03555A-10-0194
DOCKET NO. T-03902A-10-0194

**POST-HEARING BRIEF OF
tw telecom of arizona llc**

tw telecom of arizona llc ("TWTA") hereby submits the following post-hearing brief in
the above-captioned merger proceeding.

I. BACKGROUND

Qwest Communications International, Inc. ("QCII") has petitioned to transfer its operating
subsidiaries to CenturyTel, Inc. ("CenturyLink"). Qwest Corporation ("Qwest") is one of QCII's
subsidiaries and, as the incumbent local exchange carrier in Arizona, contracts with competitive
telecommunications carriers for wholesale services. TWTA, as a competitive carrier, purchases
telecommunications services and products from Qwest and 1) has existing contracts with Qwest,
2) receives tariffed services from Qwest, and 3) as a competitor of Qwest, is entitled to certain
rights under provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act") and state
law. TWTA intervened and participated in this merger docket to protect its rights and interests

1 and to ensure that, if the merger is approved, certain necessary conditions are imposed.

2 In the course of considering, and taking evidence on, the Joint Notice and Application for
3 Approval of the Proposed Merger, the Utilities Division Staff, QCII, CenturyLink, and the
4 Residential Utility Consumer Office entered into a settlement agreement which addressed all
5 outstanding issues among the settling parties. No competitive carrier was a party to the
6 Settlement Agreement between the Joint Applicants, Utilities Division Staff, and RUCO filed on
7 November 25, 2010 ("Settlement Agreement"). A hearing on the Settlement Agreement was held
8 December 13, 20 and 21, 2010 and testimony was placed in the record by parties supporting and
9 opposing the Settlement Agreement.

10 **II. STANDARD FOR APPROVAL OF MERGER**

11 QCII and CenturyLink ("Joint Applicants") acknowledge that this transaction requires the
12 approval of the Arizona Corporation Commission.¹ Under Article 15, Sections 3 and 14 of the
13 Arizona Constitution and Arizona Administrative Code R14-2-803(C) ("Rule 803(C)"), the
14 Commission may reject the proposed merger if it is not in the public interest or if it fails any one
15 of the baseline criteria contained in Rule 803(C).² The public interest determination requires
16 "broad" inquiry and was employed in recent years in the U.S. WEST,³ Unisource⁴ and Global
17 Water⁵ merger proceedings. Specifically, in the U.S. WEST Merger Decision, the Commission

18
19 ¹ Campbell Direct Test. at 2-3(Ex. Q-1).

20 ² A.A.C. R14-2-803(C) ("Commission may reject the proposal if it determines that it would
21 impair the financial status of the public utility, otherwise prevent it from attracting capital at fair
22 and reasonable terms, or impair the ability of the public utility to provide safe, reasonable and
23 adequate service.").

24 ³ *In the Matter of the Merger of the Parent Corp. of Qwest Comm. Corp. LCI, Int'l Telecom
25 Corp., USLD Comm'ns, Inc., Phoenix Network, Inc. and U S West Comm'ns, Inc.*, Docket No. T-
26 01051B-99-0497, ACC Decision No. 62672 (June 30, 2000) at 25-6 ("US WEST Merger
Decision").

⁴ *In the Matter of Reorganization of Unisource Energy Corp.*, Docket No. E-0423-OA-03-0933,
ACC Decision No. 67454 (January 4, 2005) at 49, Conclusion of Law No. 5 ("Unisource Merger
Decision").

⁵ *In the Matter of the Joint Notice of Intent Under A.A.C. R14-2-803 for an Initial Public Offering
and Restructuring of Global Water Res., LLC by Global Water – Santa Cruz Water Co., et al.*,
Docket Nos. W-20446A-08-0247 *et al*, ACC Decision No. 70980 (May 5, 2009) at 10-11,
Conclusions of Law Nos. 3, 6 and 7.

1 concluded that “[w]ithout such conditions to protect the interests of the Arizona ratepayers, we
2 would have to deny the Proposed Merger pursuant to A.A.C. R14-2-803(B) and Article XV of the
3 Arizona Constitution for the following reasons: 1) It would not be in the public interest; 2) It
4 would impair USWC from attracting capital at fair and reasonable terms; and 3) it would impair
5 the ability of the public utility to provide safe, reasonable and adequate service.”⁶

6 The public interest is clearly a component of the Commission’s assessment in this case
7 and Commission precedent includes the imposition of conditions to protect the public interest.
8 The scope and breadth of the public interest inquiry depends on the individual circumstances of
9 the proposed transaction.⁷ In this case, the survival and health of telecommunications
10 competition in Arizona is one component of the public interest inquiry. Through its rule-makings
11 and orders the Commission has long supported competitive telecommunications in Arizona.
12 Even prior to passage of the 1996 Act, Arizona passed the Competitive Telecommunications
13 Services rules to advance and encourage telecommunications competition and innovation. *See*
14 A.A.C. R14-2-1101 to 1115 (Adopted effective June 27, 1995). The proposed Settlement
15 Agreement should not be approved as presented because it includes conditions that unfairly
16 disadvantage Qwest’s competitors (and competition generally) and thus is contrary to the public
17 interest.

18 **III. DISCUSSION**

19 **A. TWTA**

20 TWTA is a leading provider of “last-mile” broadband data, voice, dedicated internet
21 access, and dedicated web hosting to business customers in the Phoenix and Tucson metropolitan
22 areas. While TWTA provides service to a portion of its customers using its own fiber and
23 communications equipment (without leasing any portion of delivery facility from Qwest), TWTA
24 is largely dependent upon Qwest to reach its remaining customers by leasing the last-mile of the

25 _____
⁶ US WEST Merger Decision (62672) at 25-26.

26 ⁷ Unisource Merger Decision at 29.

1 access facility from Qwest. Purchasing the final facility to the customer's premise from Qwest is
2 entirely consistent with the 1996 Act which anticipated the sharing of some segments of the
3 public switched telephone network (PSTN) so as "[t]o promote competition and reduce regulation
4 in order to secure lower prices and higher quality services for American telecommunications
5 consumers and encourage the rapid deployment of new telecommunications technologies."⁸
6 Substantial segments of the Qwest network – e.g. dark fiber, switching equipment, and loops in
7 heavily used wire centers – are completely unavailable to Qwest's competitors. Qwest has no
8 obligation to unbundle or to lease these network elements to competitors, who are also known as
9 competitive local exchange carriers ("CLECs"). Other segments of the network – such as high
10 capacity loops into customer locations – are subject to the sharing arrangement created by the
11 1996 Act, meaning Qwest must lease those segments of its network to competitors at prices that
12 are subject to regulatory oversight and review.⁹ As discussed below, the wholesale market for
13 high capacity loops is not competitive. In other words, the telecommunications access facility
14 that TWTA uses to serve its business customers (and which is subject to varying levels of rate
15 stability under the Settlement Agreement) can be obtained by TWTA almost exclusively from
16 Qwest.

17 **B. The Settlement Agreement**

18 The Settlement Agreement submitted to the Commission for approval in this case contains
19 41 conditions spread over a 14 page attachment.¹⁰ Roughly 8.5 of the 14 pages set forth
20 "Wholesale Operations" conditions. According to Staff, these Wholesale Operations conditions
21 "will benefit CLECs operating in Arizona by ensuring, as much as possible, that the merger will
22 not adversely impact the level of service provided to the CLEC post-merger."¹¹ However, no
23 Arizona CLEC signed onto the Settlement Agreement. If the Settlement Agreement is in the best
24

25 ⁸ S. Res. 652, 104th Cong. (1996 Act Preamble).

26 ⁹ 47 U.S.C. §§ 251, 252 and 271.

¹⁰ Proposed Settlement Agreement, Attachment 1 (November 25, 2010) (Ex. JA-2).

¹¹ Abinah Settlement Test. at 8 (Ex. S-2).

1 interest of Arizona CLECs – and adequately represents CLEC interests – one would logically
2 conclude that one or more CLEC would join. Why this disparity? One reasonable explanation is
3 the fact that the vast majority of the Wholesale Operations conditions were drawn from a
4 settlement between Integra Telecom and the Joint Applicants and that settlement did not include
5 any other CLECs. Integra, Qwest and CenturyLink were involved in private settlement
6 negotiations for “at least a month”¹² prior to the final November 6, 2010 settlement between
7 Integra and the Joint Applicants. According to Integra witness Doug Denney, “no CLEC was
8 involved in the direct talks between CenturyLink and Qwest and Integra.”¹³ At the hearing, Mr.
9 Denney agreed that “the interests reflected in this [Integra] settlement agreement are Integra’s
10 interests.”¹⁴ TWTA does not fault Integra for entering into a beneficial settlement agreement with
11 the Joint Applicants. However, the settlement negotiated by Integra was designed by and for
12 Integra and was not designed to benefit the operational profiles of other CLECs as CenturyLink
13 and Qwest would have the Commission believe.

14 TWTA takes issue with the Joint Applicant’s position that because the Settlement
15 Agreement incorporates the Integra settlement conditions it is good for all CLECs and thereby
16 satisfies the public interest standard.¹⁵ While the Settlement Agreement addresses a number of
17 CLEC issues, the conditions imposed are tailored around Integra’s business and product profile.
18 The Integra business profile differs dramatically from the TWTA business model. Integra’s
19 highest priority was to ensure that the merged company would not deny, delay, degrade or
20 discriminate in the provision of unbundled network elements.¹⁶ This was eminently reasonable
21 because Integra reaches its customers by purchasing unbundled network elements from Qwest. In
22 contrast, TWTA relies primarily on special access, also purchased from Qwest, to reach its
23

24 ¹² Hearing Transcript (“Tr.”) at 436:23-24.

25 ¹³ *Id.* at 437:13-17.

26 ¹⁴ *Id.* at 437:15-17.

¹⁵ Hunsucker Settlement Test. at 3-4 (Ex. CTL-8).

¹⁶ *Id.* at 7:8-15.

1 customers.¹⁷ TWTA does not purchase UNEs to reach the vast majority of its customers.

2 The Wholesale Operations conditions provide three years of rate stability for unbundled
3 network elements¹⁸ (a boon to Integra) but, as explained below, only a one year rate stability
4 commitment for special access circuits¹⁹ (the corollary service utilized by TWTA and other
5 CLECs). Likewise, the Wholesale Operations conditions include Operational Support System
6 ("OSS") commitments that will protect unbundled network element service quality for years to
7 come. No such service quality protections exist for special access. The discussion below
8 explains why bringing parity to rate stabilization is important to competition and necessary to
9 meet the public interest standard.

10 C. Rate Stabilization for Special Access Services

11 1. Special Access

12 To serve its customers, TWTA purchases special access circuits from Qwest. These
13 circuits are dedicated telecommunications lines that connect carriers to customers. The circuits
14 allow the high-speed, high capacity transmission of voice and data between physically separate
15 locations. For example, a competitive carrier providing service to a school district might
16 purchase special access circuits from Qwest to reach most of the schools in the district while
17 serving the district head-quarters on its own network ("on-net"). That carrier is able to deploy a
18 loop facility to the district headquarters because the volume of traffic and revenues associated
19 with that location are sufficient to justify the capital investment, whereas that is not the case for
20 smaller locations with less traffic. In contrast, Qwest, which benefits from its legacy position as
21 the incumbent local exchange carrier ("ILEC"), has already deployed loop facilities to virtually
22

23 ¹⁷ *Id.* at 25-26.

24 ¹⁸ Settlement Agreement condition 23(a) ("The Applicable Time Period for Qwest's
interconnection agreements (ICAs) is at least thirty-six months after the Closing Date.") (Ex. JA-
2).

25 ¹⁹ Settlement Agreement condition 23(d)(i) ("Regarding term and volume discount plans, such
26 plans offered by Qwest as of the Closing Date will be extended by twelve months beyond the
expiration of the then existing term, unless CLEC indicates it opts out of this one-year
extension.") (Ex. JA-2).

1 all locations within its service territory and need not lease facilities from another carrier to reach a
2 customer.

3 In Arizona, because Qwest is not just the ILEC, but is also the dominant local exchange
4 carrier, TWTa has no alternate supplier for special access. Qwest is virtually the only carrier
5 with facilities (loops) into business locations. So long as the last mile facilities are available to
6 Qwest competitors at reasonable prices, Arizona businesses have a choice in providers. However,
7 in Arizona, aside from purchased access from Qwest, there are no competitive alternatives for
8 wholesale special access; this was recently confirmed by the FCC in an order denying Qwest's
9 Petition for Forbearance in the Phoenix MSA. In its petition, Qwest sought, among other things,
10 forbearance from loop and transport unbundling obligations of Sections 251(c)(3) and
11 271(c)(2)(B)(ii) of the 1996 Act and for mass market and enterprise switched access services. In
12 the course of reviewing Qwest's petition, the FCC gathered information directly from the Arizona
13 Corporation Commission regarding telecommunications competition in Arizona.²⁰ The FCC's
14 order denying Qwest's petition summarized and confirmed a number of relevant factual findings
15 based on the data gathered:

16 "Whatever specific measure of competitive deployment is more accurate,
17 we find insufficient competitive deployment of last-mile facilities to allow
18 significant levels of competition in the relevant wholesale markets."²¹

19 "...
20 "The Commission previously has recognized that there are significant
21 barriers to the deployment of last-mile network facilities. See, e.g., *Triennial
Review Remand Order*, 20 FCC Rcd at 2579-81, 2616-19, ¶¶ 72-77, 150-
54; *Triennial Review Order*, 18 FCC Rcd at 17107-09, 17122-25, 17160-
62, 17207-09, ¶¶ 205-07, 237-40, 303-06, 371-73."²²

22 ²⁰ See Late-Filed Reply Comments of the Arizona Corporation Commission, *In the Matter of*
23 *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona*
24 *Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113, submitted March 2, 2010 at
9-11 ("ACC Forbearance Reply").

25 ²¹ *In the Matter of Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the*
Phoenix, Arizona Metropolitan Statistical Area, Memorandum Opinion and Order, WC Docket
No. 09-135, FCC 10-113, released June 22, 2010 ("Qwest Phoenix Forbearance Order") ¶71, n.
212.

26 ²² *Id.* ¶72, n. 216.

1 . . .
2 “As explained in our competitive analysis, *supra*, there is no record
3 evidence of significant competition for the wholesale products used to serve
4 either mass market or enterprise customers.”²³

5 The FCC based its conclusion – less than a year ago – on Arizona data related to
6 telecommunications competition in Arizona. The Arizona Commission collected that data from
7 competitive providers in Arizona and from Qwest. After analyzing the data, the Commission
8 recommended against granting Qwest’s Petition because “Evidence of Substantial Facilities
9 Based Intra- and Intermodal Competition is Not Present.”²⁴ Further, the Commission concluded
10 that the data indicated that “Qwest is by far the dominant facilities-based carrier yet in the
11 business or enterprise market.”²⁵ On this issue, the Commission’s own data and advocacy to the
12 FCC establishes that Qwest is able to exercise market power in the wholesale business market and
13 consequently can increase prices, or reduce services, without repercussion.

14 In the nine months following the ACC Forbearance Reply, the Commission Staff’s
15 position on this issue did not change. In prefiled testimony submitted in this merger docket, Staff
16 explained that “the business market . . . remains highly dependent on the Qwest network for
17 transport and last-mile access to customers.”²⁶ In sum, TWTA does not have an alternate
18 mechanism for reaching its customers. Qwest’s control over last-mile facilities could be used to
19 weaken a competitor’s ability to compete in the future if conditions are not imposed that protect
20 the price and quality of wholesale inputs.

21 **2. Special Access Prices.**

22 TWTA, like many other CLECs operating in Arizona, purchases special access services
23 under volume/term discount arrangements. Qwest monthly tariffed special access rates are
24

25 ²³ *Id.* ¶ 96.

26 ²⁴ ACC Forbearance Reply at 8.

²⁵ *Id.* at 21.

²⁶ Fimbres Direct Test. at 7:11-14 (Ex. S-3).

1 extraordinarily high.²⁷ Accordingly, TWTA has a four-year commitment called the Regional
2 Commitment Program ("RCP").²⁸ TWTA's existing RCP will expire on June 1, 2011.²⁹ Under
3 this existing RCP, TWTA receives a 22% discount off of Qwest's monthly rates for DS1 and DS3
4 special access services.³⁰ During the term of the RCP, changes to Qwest's monthly tariffed rates
5 do not apply to circuits purchased by TWTA. In exchange, TWTA promises Qwest that at least
6 90% of its DS1 and DS3 special access circuits will remain in service with Qwest for the duration
7 of the plan. (The 90% assessment is measured annually and ratcheted upward prospectively
8 following each year in which the customer's special access purchases increase.) If TWTA's
9 purchases fall below 90 percent, it incurs a penalty equal to the cost of the additional special
10 access circuits necessary to meet the 90% commitment.³¹ Under the RCP, TWTA gains price
11 predictability and Qwest locks in a set number of special access circuit sales from TWTA.

12 TWTA's fear – that the merged company will undercut stable, predictable pricing for
13 special access – has already materialized. After announcing the proposed merger, Qwest adopted
14 a number of changes to the RCP that harm competition. The new RCP available from Qwest (the
15 *only* RCP available to new or renewing CLECs after June 1, 2010), requires a 95% commitment
16 rather than the 90% prior commitment. Like the old RCP, the new RCP evaluates annually the
17 95% measure and ratchets the prospective minimum commitment upward. This will make it even
18 more difficult for carriers like TWTA to grow with on-net facilities. If TWTA builds to a current
19 customer, and no longer purchases that circuit from Qwest, TWTA faces a penalty for not buying
20 from Qwest. Additionally, unlike the old RCP, the new RCP measures TWTA's volume
21 commitment on a revenue basis, instead of a circuit basis. As a result, TWTA is incented to forgo

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23 ²⁷ Gates Settlement Test. at 32:8-21; 18:n.24 (Ex. PLT-3).

24 ²⁸ *Id.* at 25-26.

25 ²⁹ *Id.* at 26 n. 40.

26 ³⁰ Qwest Tariff FCC No. 1 § 7.99.13(A)(1). The Qwest "legacy" RCP can be found at Qwest
Tariff FCC No. 1 §§ 7.99.13 *et seq.*; the "new" RCP can be found at Qwest Tariff FCC No. 1 §§
7.1.3 *et seq.*

³¹ Qwest Tariff FCC No. 1 § 7.99.13(A)(3)(c) ("For each month the in-service circuits fall below
the commitment level, the customer will be charged a shortfall on their next month's billing.").

1 any adjustment to its network – no matter how helpful or beneficial to the end-user customer – if
2 that change would reduce Qwest’s overall revenue from TWTa so as to cause TWTa to miss a
3 revenue volume commitment. A reduction in Qwest’s special access revenue stream from TWTa
4 will result in a financial penalty for TWTa.

5 Qwest has argued that these term/volume contracts are voluntary, commercial
6 arrangements that are entered into at arm’s length and benefit CLECs. But this is simply not the
7 case. The RCP is the only bulk purchase DS1 and DS3 discount plan available to CLECs. It is
8 not a negotiated plan and Qwest has no incentive to reduce rates or be flexible in how the volume
9 is measured. In the vast majority of cases, no other carrier has DS1 or DS3 circuits to the
10 business customers served by the CLEC.³² Similarly, it is simply not economically feasible for
11 any CLEC to pay Qwest’s undiscounted monthly rate. Therefore, TWTa has little choice but to
12 agree to purchase special access pursuant to the new RCP. TWTa is not uniquely situated. Staff
13 supplied evidence during the hearing that five other Arizona CLECs have expired RCPs and will
14 be required to sign the new, more onerous and expensive RCP if the current RCP is not made
15 available post-merger.³³

16 3. Special Access Rate Stability Term on Par with UNE Rate Term

17 Subsection (a) of condition 23 of the Settlement Agreement extends all current
18 interconnection agreements (“ICAs”) for “at least thirty-six months after the Closing Date.”³⁴ By
19 agreeing to extend these interconnection agreements for three years, the Joint Applicants are also
20 extending prices for services and products purchased under the ICAs for three years. Because of
21 this condition, the CLEC that purchases high-capacity circuits pursuant to its interconnection
22

23
24 ³² Qwest Phoenix Forbearance Order” ¶71 n. 212 (citing ACC and CLEC submissions regarding
25 competitive deployment including 2006 U.S. Government Accountability Office (GAO) Report
showing that competitors with last-mile facilities reached only 3.7% of buildings in the Phoenix
MSA with at least DS1 capacity).

26 ³³ Staff Ex. 9 (Regional Commitment Plan Expiration); Tr. 393-394.

³⁴ Settlement Agreement condition 23.

1 agreement will pay a set rate (from 2010 or earlier) through at least the spring of 2014.³⁵ This
2 extension is a reasonable and appropriate means of ensuring that the merger does not wreak havoc
3 for wholesale customers. Rate stability for wholesale products will be particularly important as
4 CenturyLink and Qwest labor to achieve synergy savings³⁶ and, simultaneously, service the debt
5 of the combined company.³⁷ Any assertion that the merged company will not look to wholesale
6 customers to generate synergy savings is easily rebutted by Qwest's recent unilateral change to
7 the volume and discount terms in the Qwest RCP discuss above. Already Qwest is squeezing
8 more from wholesale customers and, as testimony in this case revealed, immediate price increases
9 would be consistent with past CenturyLink post-merger practices.³⁸

10 The three year extension for ICAs is appropriate, and stands in stark contrast to the twelve
11 month contract extension for term and volume contracts. The twelve month extension for term
12 and volume contracts will not adequately protect consumers or competition. Pursuant to its term
13 and volume contract, TWTA purchases exactly the same facility that may be purchased under an
14 ICA;³⁹ however, the Settlement Agreement extends three year rate stability *only* to the ICA high
15 capacity circuit, not those sold under a term and volume contract. The rates for circuits purchased
16 by TWTA will be held static for only one year.⁴⁰ This two year discrepancy (2012 vs. 2014) will
17 seriously undermine TWTA's ability to compete with other competitive carriers who for two
18 years will be paying the lower rates for wholesale inputs. The condition also allows Qwest to
19 increase prices and impose more restrictive terms on circuits purchased by TWTA and similarly
20 situated carriers. CLECs that purchase special access circuits from Qwest cannot easily switch to
21 purchasing UNEs because, although UNEs and special access are the same facilities, the ordering

22
23 ³⁵ The extension expiration date is linked to the merger Closing Date by condition 23. For
example, if the merger closes on March 31, 2011, the extension will expire March 31, 2014.

24 ³⁶ Ankum Direct Test. at 70-71 (Ex. PTL-4).

25 ³⁷ *Id.* at 45-46.

26 ³⁸ Gates Surrebuttal Test. at 33-34 (Ex. PTL-2).

³⁹ Tr. at 340.

⁴⁰ The term and volume contract extension is twelve months from the Closing Date, which is
expected soon after all approvals are complete. See Settlement Agreement condition 23(d)(i).

1 systems and processes for the two are completely different, exceedingly complex, and require
2 substantial investment to create and operate.⁴¹ Significant barriers prevent a UNE-based carrier
3 from switching abruptly to a special access-based system and vice versa.

4 CenturyLink explains this discrepancy in treatment for the same circuits as follows: "The
5 services provided under these kinds of contracts are considered available from multiple sources,
6 including self-provisioning by a CLEC, and are subject to pricing based on market forces rather
7 than the requirements of Section 251."⁴² This is patently false. As discussed in Section C(1),
8 *supra*, these contracts are not "available from multiple sources" and as the FCC and the ACC
9 have both found CLECs in Arizona must lease facilities from Qwest to reach the vast majority of
10 business customers.⁴³ To reach their customers, CLECs are leasing segments of the public
11 switched telephone network, built over many decades by Arizona rate payers, and which the 1996
12 Act made available to competitors for the benefit of consumers.

13 Unfortunately, testimony from CenturyLink suggests that it will manage Qwest in the
14 direction of reduced wholesale services, by putting an even tighter strangle-hold on last mile
15 facilities. CenturyLink's witness testified that "[f]or commercial and wholesale agreements,
16 when you look at QLSP, there is no real regulatory mandate that we continue to provide that
17 service. So Qwest is free today to choose to provide or not provide *and at what price*."⁴⁴ This
18 testimony suggests that CenturyLink is less focused on Qwest's opportunity to grow wholesale
19 sales by reducing prices, and more focused on the need to remain free to increase prices or
20 discontinue services unless mandated otherwise.⁴⁵ A period of rate stability is imperative as
21 CenturyLink grows into its new roles as an ILEC and its obligations to lease facilities under

22 ⁴¹ The PAETEC-McLeod Post-Hearing Brief in this proceeding will likely describe the complex
23 systems used by carriers for order processing and service delivery. Switching from a UNE based
24 business system (Integra) to a special access based profile (TWTA) is not a viable business
option.

25 ⁴² Hunsucker Settlement Test. at 16:2-5 (Ex. CTL-8).

26 ⁴³ See Section C(1) *supra*.

⁴⁴ Tr. at 297:16-20.

⁴⁵ *Id.*

1 Sections 251 and 271 of the 1996 Act.⁴⁶

2 The three year term is also consistent with the merger transition and synergy recovery
3 period identified by CenturyLink. According to CenturyLink, it will take three to five years for
4 the merged company to realize the \$575 million synergy target.⁴⁷ A similar term for rate stability
5 and continuity for all CLECs is entirely reasonable. During the synergy (merger integration)
6 period, the Commission should aim to relieve CLECs and Qwest from rate and term disputes and
7 prohibit any new wholesale charges for the same product. This may have been Staff's thinking in
8 proposing Staff condition 26 which provided "that no Qwest wholesale intrastate service offered
9 to competitive carriers as of the merger filing date will be discontinued for two years after the
10 close of the merger, unless approved by the Commission."⁴⁸ Ultimately, the Joint Applicants
11 refused this condition and agreed instead to extend ICAs, but not other contacts, by three years.
12 This decision – to reject Staff's two year compromise and instead draw lines between CLEC
13 competitors – undercuts CenturyLink's assertions that it has compromised its position to reach
14 settlement.⁴⁹ The compromise, presented by Staff, was a two year rate stability period for all
15 wholesale products.

16 Requiring a consistent three year extension would also preserve the status quo while the
17 company integrates new management and CenturyLink practices. CenturyLink recently
18 announced that the new company will migrate to a regional president structure with five of the
19 company's six new regional presidents from CenturyLink, including the president responsible for
20

21 ⁴⁶ See, *Qwest 9-State 271 Order*, WC Docket No. 02-314, FCC 02-332 (12/23/02) (subjecting
22 Qwest to ongoing compliance obligations pursuant to Section 271 authority); see also *In the*
23 *Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of*
24 *1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996
(explaining obligations of incumbent LECs regarding: (1) good faith negotiation; (2)
25 interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network
changes; and (6) collocation.).

25 ⁴⁷ Tr. at 29.

25 ⁴⁸ Fimbres Surrebuttal Test. at 27 (Ex. S-3).

26 ⁴⁹ Hunsucker Settlement Test. at 3:1-5 (Ex. CTL-9).

1 Arizona.⁵⁰ Plans for new upper level management changes in the Qwest Denver and Phoenix
2 offices are also already underway. The web-page attached as Exhibit 1 to this brief is taken
3 directly from the Qwest website and reflects the current Qwest Senior Management. CenturyLink
4 has announced that only four of the twelve Senior Managers will have Tier 1 leadership positions
5 with the combined company.⁵¹ Bill Cheek, President of Wholesale Operations for CenturyLink,
6 has been given responsibility for wholesale services for the combined company.⁵² The
7 integration required by these personnel changes will take time. Preserving the status quo for the
8 three years, as CenturyLink integrates its leadership at Qwest, will be vital going forward for
9 Arizona CLECs.

10 A three year term for special access rate stability has precedent. In the AT&T/Bell South
11 merger in 2006 AT&T agreed to a list of commitments which would extend for *thirty-nine*
12 months from the Merger Closing Date and included the following:

13 2. AT&T/BellSouth shall not increase the rates paid by existing customers
14 (as of the Merger Closing Date) of DS1 and DS3 local private line services that
15 it provides in the AT&T/BellSouth in-region territory pursuant to, or
16 referenced in, TCG FCC Tariff No. 2 above their level as of the Merger
17 Closing Date.⁵³

18 The FCC accepted these proposed commitments and approved the merger.⁵⁴ Likewise, in the
19 Verizon/MCI merger proceeding, the FCC also accepted a commitment from Verizon to preserve

20 ⁵⁰ Tr. 146-47; www.connectedplanetonline.com/independent/news/CenturyLink-outlines-post-merger-regional-structure-1202.

21 ⁵¹ See SEC Qwest-CenturyLink Filing: www.sec.gov/Archives/edgar/data/18926/000089882210000408/ctl425.htm.

22 ⁵² CenturyLink Rule 425 SEC Filing dated August 10, 2010; available at:
<http://www.sec.gov/Archives/edgar/data/18926/000089882210000524/ctl425.htm>

23 ⁵³ *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion
24 and Order, 22 FCC Rcd 5662, App. F at 147, 149-50 (2007) (“[U]nless otherwise expressly stated
25 to the contrary, all conditions and commitments...would apply...for a period of forty-two
26 months...[E]ach of the following special access commitments shall remain in effect until 48
months from the merger closing date. . .”); *AT&T Inc. and BellSouth Corp. Application for
Transfer of Control*, Order on Reconsideration, 22 FCC Rcd 6285 (2007) (changing the terms and
shortening the duration of special access condition six from 48 to 39 months).

⁵⁴ *Id.*

1 special access rate stability:

2 2. For a period of thirty months following the Merger Closing Date,
3 Verizon/MCI shall not increase the rates paid by MCI's existing customers (as
4 of the Merger Closing Date) of the DS1 and DS3 wholesale metro private line
5 services that MCI provides in Verizon's incumbent local telephone company
6 service areas above their level as of the Merger Closing Date.⁵⁵

7 In the Qwest-CenturyLink merger, the third and fourth largest telephone companies are
8 combining and will remain the third largest landline carrier in the country. The important
9 protections afforded competitive providers in the AT&T/BellSouth and Verizon/MCI mergers
10 should also be made applicable in this case.

11 **4. Recommended Condition.**

12 TWTA asks the Arizona Commission to revise one term of the proposed Settlement
13 Agreement to address the threat to the affordability of special access. Specifically, TWTA asks
14 that the duration of commitments applicable to special access in the Settlement Agreement be at
15 least equal to the duration of comparable commitments applicable to UNEs. To achieve this
16 revision, TWTA recommends replacing the word "twelve" in subsection d(i) of condition 23 with
17 "thirty-six" and the word "one-year" which follows in that same sentence with "three-year." The
18 complexities of post-merger integration and adjustment, combined with a more exclusionary
19 volume/term agreement, do not bode well for competition and consumer welfare in Arizona. All
20 preliminary indicators – including the new RCP – point to a post-merger Qwest that will use its
21 stranglehold over last mile facilities to increase TWTA's costs and stunt the development of a
22 wholesale market for special access services. These outcomes hurt competition and, more
23 importantly, ultimately harm Arizona businesses.

24 ⁵⁵ *Verizon Comm'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control*,
25 Memorandum Opinion and Order, 20 FCC Rcd 18443, App. G at 128-130 (2008) (setting UNE
26 related conditions at 24 months and the conditions related to special access and Internet
backbones at 30 and 36 months respectively).

1 **5. Joint Applicant's Response to Parity Request**

2 Joint Applicants have struggled mightily to present a list of settling carriers in Arizona
3 that is long and robust. It is not. With respect to CLECs, Joint Applicants have executed separate
4 settlement agreements with Integra, 360Networks, and Cox Communications, Inc.⁵⁶ Cox
5 Communications, Inc. is a cable company, with a CLEC subsidiary. The unique concession in its
6 settlement was the extension of the current contract between Qwest and Cox for sub-loop access
7 at multi-dwelling units **for an additional 4 years.**⁵⁷ The operational profile of Cox
8 Communications, Inc. is vastly different from a CLEC. A Cox settlement does not represent the
9 interest of Arizona CLECs. 360Networks is a CLEC, and entered into a short settlement before
10 the Arizona merger proceeding began, securing a three year extension of its interconnection
11 agreement. 360Networks, like Integra, purchases unbundled network elements. In sum, two true
12 CLECs – both users of UNEs rather than special access circuits – have settled with the Joint
13 Applicants. The total list of intervening CLECs in the merger case is much longer and includes:
14 XO Communications Services, Inc., McLeodUSA Telecommunication Services, Inc., d/b/a
15 PAETEC Business Services, Pac-West Telecomm, Inc., Level 3 Communications, LLC, Integra
16 Telecom, 360 Networks, DIECA Communications Inc. d/b/a Covad Communications Company,
17 Cox Arizona Telecom, L.L.C., and tw telecom of arizona llc. Thus, three of nine intervening
18 CLECs have settled with the Joint Applicants, and one of those three settling “CLECs” was a
19 cable company. If the list of settling parties is the applicable yardstick, Joint Applicants cannot
20 claim to have reached settlement with even a large minority of the intervening CLECs.

21 Joint Applicants may also argue that TWTA's issue – parity for special access contracts –
22 has been raised at the federal level and should be resolved by the FCC in a separate access docket.
23 However this assertion may be made with respect to broadband investment, ICA extensions, and

24 _____
25 ⁵⁶ Joint Applicants have occasionally listed Westel as an Arizona CLEC. Westel is not an
Arizona CLEC and is not included on the ACC's list of certified CLECs.

26 ⁵⁷ See Notice of Filing Settlement Agreement Between and Among Cox, CenturyLink and Qwest
(November 22, 2010) (Letter of Jennifer Hightower 2).

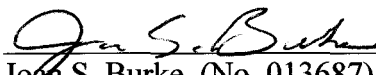
1 service quality concerns. The ACC has no authority to require the Joint Applicants to extend
2 ICAs for three years beyond the merger Closing Date. Nor could the ACC require CenturyLink
3 to invest \$70M in broadband in Arizona, or enter into a four year contract for MDU sub-loop
4 access. However, if the Joint Applicants had presented to the ACC a Settlement Agreement that
5 included, as a condition, broadband funding for Northern Arizona (including the Phoenix metro
6 area) and prohibited funding for Southern Arizona, this Commission could refuse to approve that
7 Settlement Agreement as unfair and contrary to the public interest. Likewise, in this merger
8 proceeding, the Commission has a legal obligation to ensure that the Settlement Agreement is in
9 the public interest and that it does not unfairly disadvantage one class of Qwest customers, or
10 expose a select group of local stakeholders to large price increases soon after the merger Closing
11 Date.

12 IV. CONCLUSION

13 TWTA requests that the Administrative Law Judge approve the proposed Settlement
14 Agreement with the recommended revision described in Section C(4) above. This revision will
15 insure fair treatment of CLECs once approval is given, and once CenturyLink has the market
16 power to discontinue, or vastly increase prices of wholesale products sold under term and volume
17 contracts.

18
19 RESPECTFULLY SUBMITTED this 18th day of January, 2011.
20

21 By:


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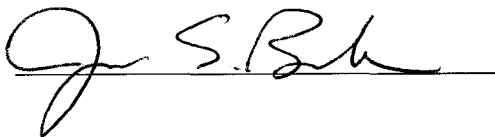
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26


Exhibit 1



About Qwest : Company Information : Senior Management
Senior Management Team

Qwest's Senior Management Team is made up of proven and seasoned business leaders who are committed to perfecting the customer experience.



Edward A. Mueller
Chairman
& Chief Executive
Officer
Qwest
Communications
International Inc.



Stefan D. Stein
Senior Vice President, Risk
Management
& Chief Ethics &
Compliance Officer



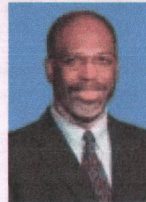
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Executive Vice President
Business Markets Group



Teresa A. Taylor
Executive Vice President
& Chief Operating Officer



Rich Baer
Executive Vice President,
General Counsel &
Chief Administrative Officer



Roland R. Thornton
Executive Vice President
Wholesale Markets



Stephanie G. Comfort
Executive Vice President
Corporate Strategy



Bob Tregemba
Executive Vice President
Network Operations



R. Steven Davis
Senior Vice President
Public Policy & Government
Relations



Dan Yost
Executive Vice President
Mass Markets



Joseph J. Euteneuer
Executive Vice President
& Chief Financial Officer



Girish Varma
Senior Vice President &
Chief Information Officer